No. 382

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

AMBROSE P. McCOY, ET AL
Petitioners

vs.

PROVIDENCE JOURNAL COMPANY, ET AL
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

JOSEPH L. BREEN
Counsel for Petitioners

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit affirming the judgment of the District Court for the District of Rhode Island, permanently enjoining the City Treasurer of Pawtucket, Rhode Island, "and all persons acting under or in concert with him" from withholding certain municipal tax abatement resolutions and lists from the plaintiffs and from preventing them from inspecting those resolutions and lists "at all reasonable times during regular business hours".

Opinions Below

The opinion of the District Court for the District of Rhode

Island is reported in 94 F. Supp. 186. That of the U. S. Court of Appeals for the First Circuit is reported in 190 F.2d 760.

Jurisdiction

The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. 1254 (1).

Questions Presented

(1) Whether the statement by the Rhode Island Supreme Court of a general "doctrine" of law relating to inspection of public records was not the law of Rhode Island determining the rights of plaintiffs instead of the statement by an inferior Rhode Island Court (in a case reversed and dismissed on appeal to the State's highest court) of a different "doctrine" on public records.

(2) Whether there was a denial of the equal protection of the laws to these plaintiffs in any matter of right.

(3) Whether the Court of Appeals for the First Circuit should not have followed up its finding that "We think the defendants' motion to strike should have been granted promptly" with a direction to correct that error and strike the complaint.

Constitutional, Statutory and Procedural Provisions Involved

Constitutional Amendment XIV, Sec. 1.

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

R. S. 1979, 8 U.S.C. 43.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or caused to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rules of Civil Procedure

Rule 8(a)

"(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to suppor it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

Rule 8 (e)(1)

"(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

Rule 61

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Statement

The opinion of the United States Court of Appeals for the First Circuit contains the following quoted statement of the circumstances of the case to which has been added a few additional facts apart from quotations.

"The plaintiff, Providence Journal Company, is a Rhode Island corporation engaged in the business of publishing newspapers in the city of Providence which have a wide circulation throughout the state and a substantial circulation in the adjoning city of

Pawtucket. The plaintiff, Sevellon Brown, is the editor and publisher of the Providence Journal Company, and as such is the chief executive officer of that corporation. The plaintiff, Joseph A. Kelly, is a reporter for the Providence Journal Company and the manager of its Pawtucket bureau. Both Brown and Kelly are citizens of the United States and of the state of Rhode Island, Brown being a resident of Providence, and Kelly a resident of Pawtucket, where he, and the Providence Journal Company as well, are also taxpayers.

"The defendant, McCoy, is the Mayor of Pawtucket; the defendant, McAloon, occupies the combined offices of City Treasurer and Collector of Taxes, and the other defendants are the City Clerk, the Assessors of Taxes, and various other executive and legislative officials of that city.

"Stated in general terms the complaint alleges that the defendants, acting individually and in concert, have deprived the plaintiffs of rights guaranteed to them by the Federal Constitution in that they have prevented the plaintiffs from gaining access to certain fiscal records of the city of Pawtucket for the purpose of publication, while permitting others in like circumstances to have access to those records for the same purpose:

"There is no serious dispute as to the basic facts as found by the court below.

"On December 31, 1947, the City Council of the city of Pawtucket, which is a bicameral body consisting of the Board of Aldermen and the Common Council, met in special session and passed a joint resolution abating real and personal property taxes in the aggregate amount of $89,377.12, as set forth in a list of tax abatements submitted by the Board of Assessors of Taxes which was affixed to and made a part of the resolution. Immediately upon adjournment of this meeting the plaintiff Kelly asked the defendant, Donovan, who was the City Clerk and as such the Clerk of the Board of Aldermen, for permission to see the resolution with its appendant list of abatements. Donovan told Kelly to see him 'tomorrow'. Repeatedly during the following weeks

reporters for the Providence Journal Company, and other officers and agents of that corporation, made requests, at first orally and later in writing, of various Pawtucket officials for permission to see the list of tax abatements, but in every instance the request met with postponement, evasion or rebuff."

Of all these Pawtucket city officials only one, the City Treasurer, was positively found to have had custody of any of these records and then only of those for one year. (R. 56). The only request of him was a letter demanding the list of abatements for the years 1942-1947 inclusive. This demand was contained in a sealed letter left at his private office at 3:30 p.m. It was followed by a telephone call at 4:45 p.m. on the same afternoon wherein the caller asked if the demands would be complied with. The answer, also over the telephone, was "No comment". (R. 59).

"Affairs remaining in this state of deadlock, Mayor McCoy on January 21, 1948, at a regular meeting of the Board of Aldermen, announced the release of the 1947 tax abatement list to the Pawtucket Times, a daily newspaper published in the city of Pawtucket which is a competitor in that city of the Providence Journal. And then at the same meeting the Board of Aldermen passed an ordinance providing in pertinent part that 'No city officer, official, agent or employee shall permit any person to examine any tax abatement record or any copy thereof, nor shall any such officer, official, agent or employee disclose the contents of any such record to any person, unless such person has permission of the City Council to examine such record.' This ordinance was passed by the Common Council two days later and the Mayor immediately approved it.

"None of the plaintiffs, and no one else on behalf of the Providence Journal Company either then, or subsequently, applied to the City Council for permission to see the tax abatement record pursuant to this ordinance." The record also discloses that no demand, written or oral, was made of any Pawtucket city official

for inspection of the abatement records, by these plaintiffs, after the passage of this ordinance. (R. 147). "Instead on February 7, 1948, mandamus proceedings on the relation of the plaintiffs herein were instituted in the Superior Court of Rhode Island to compel Mayor McCoy, Treasurer and Tax Collector McAloon, and some of the other defendants, to make the tax abatement record available to the plaintiffs for publication. Thereupon Mayor McCoy immediately called a special session of the City Council for February 9, at which he read the following communication dated February 7, from himself to the Board of Aldermen:

'Gentlemen:

'It has come to my attention that certain attorneys and individuals engaged in the examination of titles find it necessary to examine tax abatement records of the City of Pawtucket. It is also obvious that any member of the public who has proper interest in such records should be permitted to see the same. Clearly, such persons should not be required to seek special permission each time the necessity for the examination of such records arises.

'In addition, it has come to my attention that The Pawtucket Times, a newspaper published in the City of Pawtucket, is desirous of examining these records for the purpose of publication in whole or in part as a public service.

'Accordingly, I have called your Honorable Body to meet in special session at this time (Monday, February 9, 1948 at five o'clock P.M.) to act upon resolutions pertaining to these matters.

Respectfully,

Ambrose P. McCoy,

Mayor.'

"Obviously in response to this letter, the City Council immediately passed two joint resolutions which were approved by the mayor on the same day. In one of these it was resolved first that permission be granted 'to any person himself or through his agent, engaged in the examination of titles or work of similar nature, to examine tax abatement records pertaining to such titles; permission is also granted to any person having an interest in such records which is such as would enable him to maintain or defend an action for which such records can furnish evidence or necessary information, whether such interest is private, capable of sustaining a suit or a defense in his own personal behalf; or capable of sustaining a suit or a defense as the representative of the common or public rights;' and second it was further resolved, 'that no person shall be permitted to examine such records for publication without the express permission of the city council.' In the other it was resolved that permission be granted 'to any duly authorized representative of The Pawtucket Times, a newspaper published in the City of Pawtucket, to examine and copy all tax abatement records for publication in whole or in part.'"

The plaintiffs prevailed in the mandamus proceedings in the Rhode Island Superior Court. Upon appeal, the judgment was reversed and remanded by the Supreme Court of Rhode Island to the Superior Court with directions to dismiss the petition for mandamus. (*Nolan v. McCoy*, 73 A(2d) 693).

Reasons for Granting the Writ

I

The District Court and the Court of Appeals determined that there had been a denial to the plaintiffs of rights established under the law of the State of Rhode Island and hence a denial of the equal protection of the laws under the Constitution of the United States. On the authority of *Fidelity Trust Co. v. Field*, 311 U. S. 169 (1940) and *West v. A. T. & T. Co.*, 311 U. S. 223 (1940) these courts held that a single decision of the Superior Court of Rhode Island established those rights. In ascertaining the law of Rhode Island the lower federal courts considered two opinions of the

Supreme Court of Rhode Island and the above decision of the Superior Court of Rhode Island, an inferior court, which latter decision was reversed and the entire proceeding dismissed by order of the Supreme Court of Rhode Island. This dismissal occurred prior to any decision in either federal court.

The two Rhode Island Supreme Court cases are *In re Caswell,* 18 R. I. 835; 29 Atl. 259 and *Nolan v. McCoy,* —R. I.—; 73 A2d 693. The Superior Court case is the lower court decision in the latter Supreme Court case.

The *Caswell* case involved a newspaper's right to inspect "for publication or otherwise" a judicial record. The Supreme Court, in 1893, in denying any such inspection, stated the law of Rhode Island as follows:

> "At common law, every person is entitled to the inspection, either personally or by his agent, of public records (this term including legislative, executive and judicial records, etc.) provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information . . . As there is no statute in this state, however, regulating this matter, the common law rule above stated, in so far as it is applicable here, is doubtless in force. . . . " 18 R. I. 835, 836; 29 Atl. 259.

Nolan v. McCoy, supra, involved the right of the plaintiffs in the case at bar to inspect the identical tax abatement records herein sought. This was a petition for mandamus originating in the Superior Court. The Superior Court granted the writ, and the pertinent portions of its decision are quoted in the opinion of Judge Hartigan in the United States District Court in this case. 94 F. Supp. 186. This decision of the Superior Court was followed by both federal courts as the law of the State of Rhode Island. The justice of the Superior Court recognized the existence of "the early common law doctrine" as ennunciated in the *Caswell*

case, but repudiated that doctrine, and applied what he considered to be the common law of the "modern American cases." The decision of the Superior Court was appealed to the Supreme Court, where many issues, including the existence of plaintiffs' alleged rights, were argued. That appeal was sustained on numerous grounds, but the Supreme Court saw no necessity for deciding all points "in view of the fact that the writ must be quashed in any event." However, the Court went out of its way, expressly, to reaffirm and recognize the principle of the *Caswell* case. *Nolan v. McCoy*, —R. I.—; 73 A2d 693, 697.

The *Caswell* case lays down but one common law doctrine applicable to all public records, be they legislative, executive or judicial. There is no separate and different rule applicable to non-judicial records. Such is the law of Rhode Island as expounded by its highest court in 1893 and reaffirmed in 1950. It was, therefore, error not to recognize the doctrine of the *Caswell* case as the law of Rhode Island. *Fidelity Trust Co. v. Field*, supra; *West v. A. T. & T. Co.*, supra; *Erie R. Co. v. Tompkins*, 304 U. S. 78.

II

Assuming these plaintiffs were discriminated against, they were discriminated against in no matter of right. The discrimination involved but the extension of favors and courtesies to others. The basic right of these plaintiffs to inspect public records, as that right is recognized in Rhode Island, has not been affected. *In re Caswell*, supra, determines plaintiffs' rights to be conditional and qualified, rather than absolute. No plaintiff has applied to the City Treasurer, defendant McAloon, for the tax abatement records at any reasonable time during regular business hours, and brought himself within the doctrine of the *Caswell* case.

These records have been given to a local newspaper as a matter of courtesy and favor. Plaintiffs complain because they have not been accorded the same favor and courtesies. Although requests were made of various defendants (officials of the City of Paw-

tucket), the only thing most of those defendants could have done was to get the records for plaintiffs as a matter of favor. This, they declined to do. Such cannot be considered a denial of the equal protection of the laws.

III

The Court of Appeals in this case held:

> " . . . It is hard to imagine a pleading more completely at variance with both the letter and the spirit of Rule 8, (e)(1) which requires that each averment of a pleading be 'simple, concise and direct.' We think the defendants' motion to strike should have been granted promptly, whereby the issues might have been clarified for the benefit of all concerned."

However, pursuant to Rule 61 it further decided:

> "However, we cannot say that the complaint is so badly drawn that the defendants, although no doubt handicapped, were prevented from making their defense, or that either we or the court below, although also seriously handicapped, have been wholly prevented from ferreting out the issues lurking in the verbiage."

In this latter regard the court was in error. The one issue which the District Court decided in favor of plaintiffs was not actually in issue under the pleadings. There was no issue raised as to a denial of any plaintiff's rights to inspect public records at the office of the custodian thereof during regular business hours. The issue in this regard, as deduced by the defendants from these prolix pleadings, was whether or not plaintiffs had brought themselves within the doctrine of the *Caswell* case. There being no proper demand and refusal of the custodian for the records it was felt there was no basis for injunctive relief.

Respectfully submitted,

JOSEPH L. BREEN,

Counsel for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1951.

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AMBROSE P. McCOY ET AL.,
Petitioners,

v.

PROVIDENCE JOURNAL COMPANY ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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[illegible], 1951.

[illegible] PRINTING CO., PROV., R. I.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS, PROVIDENCE JOURNAL COMPANY, SEVELLON BROWN AND JOSEPH A. KELLY, IN OPPOSITION.

Opinions Below.

The opinion of the United States District Court for the District of Rhode Island is reported in 94 F. Supp. 186 (Record, pp. 50-70). The opinion of the United States Court of Appeals for the First Circuit, affirming the judgment of the District Court, is reported in 190 F. (2d) 760 (Record, pp. 650-659).

Ground of Jurisdiction Claimed by Petitioners.

The jurisdiction of this Court is invoked by the petitioners under 28 U.S.C. sec. 1254 (1), the statute governing applications for writs of certiorari.

Questions Presented by Petitioners and Summary of Respondents' Points.

The questions presented by the petitioners' application (see page 2 of their brief in support of their application) may properly be summarized, along with the respondents' answers thereto, as follows:

1. Did the District Court and the Court of Appeals both err in holding that the records here involved (tax abatement records of the City of Pawtucket, Rhode Island) were public records to which respondents had the right of access? Moreover, is the issue as to the public nature of these records sufficiently "special and important" to justify the granting of the present application (Supreme Court Rule 38, sub-sec. 5)? It is our position in opposing the petitioners' application (*a*) that these records were admitted to be public records by the petitioners at the trial, (*b*) that at common law they are public records to which persons in the position of these respondents have the right of access, and (*c*) that they are public records to which respondents have the right of access, by an express decision of a Rhode Island Court (which decision was followed in the case at bar by both the District Court and the Court of Appeals). The issue on this point is so clear, we submit, both as a matter of fact and as a matter of law, that the application on this ground appears to be entirely devoid of merit.

2. Did both of the lower Courts err in holding that the respondents (the original plaintiffs) were denied the equal

protection of the laws (Art. XIV, sec. 1, of the Amendments to the Constitution; U.S.C. Title 8, sec. 43; U.S.C. Title 28, sec. 1343 (3))? It is our position that the determination of this question, which in the petitioners' brief is set up as a separate issue, is really governed by the determination of the issue stated in the preceding paragraph. If these records were public records, then the constitutional violation and the violation of the Civil Rights Act follow as a matter of course. Moreover, as with the first question, there is nothing here to move this Court to grant certiorari.

3. Is there any error involved in the record, such as to move this Court to grant certiorari, on the claim of the present petitioners that the complaint was unduly prolix? This contention was held by the District Court at the conclusion of the trial to be without merit. It was similarly held by the Court of Appeals to have no merit, even though the Court of Appeals was, as a matter of dictum, critical of the form of the complaint. On this state of the record we submit that this is a trivial and frivolous ground on which to ask this Court to grant certiorari.

Statement.

The two extensive opinions in the Courts below give a full and accurate summary of the facts in the case at bar.

The case involves on the one hand a Rhode Island newspaper with a large circulation, the Providence Journal, and its editor and a branch office manager, Sevellon Brown and Joseph A. Kelly; and on the other the Mayor, Treasurer and various other officials of the City of Pawtucket.

The issue presented in the complaint was whether these officials could, according to their own arbitrary whim, withhold from the Providence Journal and its representatives

certain important tax records of the City of Pawtucket (a city of some 77,000 people—Kelly's testimony, Record, pp. 78-79), while at the same time granting access to those records to other persons, including a local Pawtucket newspaper, the Pawtucket Times (Record, pp. 2-19; Opinion of the District Court, Record, pp. 50-56, *et passim*, 94 F. Supp. 186, 187-190; Opinion of the Court of Appeals, Record, pp. 650-653, 190 F. (2d) 760, 761-763). The further issue presented by the complaint was whether such arbitrary and capricious action deprived the Providence Journal and its representatives of its rights under the "equal protection" clause of the XIV Amendment and accordingly its rights under U.S.C. Title 8, sec. 43 (Complaint, Record, pp. 15-16; Opinion of the District Court, Record, pp. 53-54, 65-68, 94 F. Supp. 186, 189, 193-196; Opinion of the Court of Appeals, Record, pp. 654-658, 190 F. (2d) 760, 763-766).

The tax records in question were records of tax abatements granted to persons and corporations in the City of Pawtucket by the bi-cameral City legislature, the City Council (composed of a Board of Aldermen and a Common Council). These abatements were substantial in amount. They involved $89,377.12 in the resolution passed 31 December, 1947 (Record, Opinion of the District Court, pp. 55-56). The amounts for the previous years were as follows:

Date	*Amount*
December 31, 1942	$ 20,081.42
December 31, 1943	$111,416.14
December 31, 1945	$142,172.89
February 12, 1947	$107,205.44

(Record, Opinion of the District Court, p. 56, 94 F. Supp. 186, 190; Menihan's testimony, Record, p. 356; Exhibit 14, Record, p. 357.)

The Journal and its representatives sought to obtain the lists of these very substantial tax abatements from the City officials. Informal and formal requests were all rebuffed. The District Court's findings are very full in this regard (Opinion of the District Court, Record, pp. 57-61, 94 F. Supp. 186, 190-192). The Court of Appeals held (Record, pp. 653-654, 190 F. (2d) 760, 763):

> ". . . They have given access to those records to the Pawtucket Times, but denied like access to its competitor the Providence Journal. To be sure, the denial is not direct and categorical, but it is none the less effective. Postponement, evasion and rebuff by the city officials are as effective as outright refusal, and application by the Providence Journal, or its officers or agents, to the City Council pursuant to local legislation for permission to see the records would clearly accomplish nothing, for the District Court found on such abundant evidence as to make challenge futile that the discrimination practiced by the defendants against the Providence Journal was 'wilful,' 'purposeful,' 'arbitrary,' and 'capricious,' and that the only reasonable conclusion to be drawn from the record as a whole was that the enactments of the City Council were but 'the crowning achievement' of the discrimination which it had found to exist.
>
> "Thus the substance of the plaintiffs' case, omitting their contention with respect to freedom of the press which in our view it is not necessary to consider, is that they have the right under the law of Rhode Island to inspect and to publicize the fiscal records of the city of Pawtucket, and that the officials of that city, at first without statutory authority but later under color of city ordinances, have denied them that right while conferring it upon others whose circumstances were similar to their own.

> "We are confronted, therefore, with an issue of equal protection of the laws, and in keeping with accepted judicial practice we shall confine ourselves to that issue, passing the broader issue of freedom of the press, for in our opinion the case can be disposed of on the narrower issue."

After the dispute was under way, the Pawtucket City Council passed an ordinance that forbade anyone to inspect the records except with the consent of the City Council and later passed two resolutions, one of which expressly gave the locally competing newspaper, the Pawtucket Times, the right to inspect these tax abatement records (Opinion of the District Court, Record, pp. 59-61, 94 F. Supp. 186, 191-192). These pieces of legislation are dealt with fully in the two opinions below.

The statement of facts in the petitioners' application requires comment in two incidental respects. It purports to copy the opinion of the Court of Appeals in so far as it dealt with the facts, but it omits the explanatory first paragraph which summarizes the case. This paragraph reads as follows (Record, p. 650, 190 F. (2d) 760, 761):

> "This is an appeal from a final judgment permanently enjoining the City Treasurer, who is also the Tax Collector, of Pawtucket, Rhode Island, 'and all persons acting under or in concert with him,' from withholding certain municipal tax abatement resolutions and lists from the plaintiffs, and from preventing them from inspecting those resolutions and lists 'at all reasonable times during regular business hours.'"

In the second place, petitioners' statement says in reference to the opinion of the Court of Appeals (p. 3 of their

brief): "The opinion . . . contains the following quoted statement of the circumstances of the case. . . ." This seems to imply that the Court of Appeals took over the lower Court's opinion and incorporated it in its own opinion. This is not so. The Court of Appeals in affirming the District Court made its own findings and wrote a detailed opinion of its own (*cf.* Record, pp. 650-653, 190 F. (2d) 760, 761-764, and Record, pp. 54-63, 94 F. Supp. 186, 189-193).

Argument.

I. The Petitioners' Contention that These Records are Not Public Records to which Respondents have the Right of Access Furnishes No Basis for the Granting of a Writ of Certiorari in This Case and is in Any Event Entirely Unsound.

The petitioners contend that the tax abatement records which are the subject of the dispute here are not, under the laws of Rhode Island, public records to which respondents have the right of access. They contend that the two lower Courts erred in holding that they were. They contend further that the two lower Courts should in some way have been bound by an earlier Rhode Island decision (*In re Caswell,* 18 R.I. 835) and should not have followed a later Superior Court decision which was exactly in point and which had to do with these very records.

Even if these contentions constituted any basis for the exercise of this Court's jurisdiction in granting certiorari (which it seems to us clearly they do not), they are completely unsound.

a. The testimony at the trial shows that the petitioners admitted that these records are public records.

The position of the Pawtucket city officials seems to have undergone many changes on this point. At the trial the defendant McCoy (the then Mayor of Pawtucket) and the defendant Henderson, the majority leader of the Board of Aldermen and the only member of the bar among the defendants, both took the position that these records were public records (McCoy's testimony, Record, p. 203; Henderson's testimony, Record, pp. 498-499). To the same effect is the testimony of two other defendants, a chairman and a member of the Board of Tax Assessors (Garvey's testimony, Record, p. 376; Murphy's testimony, Record, p. 414). The Deputy City Treasurer Menihan, who is not a defendant, also took the same view (Menihan's testimony, Record, pp. 366-369). The defendant Henderson was very explicit in what he said (Henderson's testimony, Record, p. 498):

> ". . . But, I do still feel that tax abatement is a public record. I think it should be if it isn't. . . . I say, frankly, that in my opinion the tax abatement record should be a public record. . . ."

The District Court made a finding in general as to public records of this sort apart from these particular records which were withheld (Record, pp. 56-57, 94 F. Supp. 186, 190):

> "The public records of the City of Pawtucket used in the transaction of municipal affairs and the records pertaining to matters of public interest and concern are, in general, open to general inspection by any member of the public (including newspaper reporters) at all reasonable times on business days and during regular business hours."

Thus by the time the trial had ended there was little doubt that one issue had apparently been settled, namely, that these records were public records.

b. At common law these records are public records to which persons in the position of these respondents have the right of access.

As a matter of general law, we need hardly labor the point that it would be extraordinary if such a fundamental record of municipal finance as a tax abatement list were not a public record to which the public has the right of access. On the general question see—

Nowack v. *Fuller,* 243 Mich. 200, 219 N.W. 749 (1928).

Burton v. *Tuite,* 78 Mich. 363 (1889).

Bend Publishing Co. v. *Haner,* 118 Ore. 105, 244 Pac. 868 (1926).

Cordero v. *Prensa Insular de Puerto Rico,* 169 F. (2d) 229 (1948) (C.C.A. 1).

Hobart v. *Commissioner of Corporations & Taxation,* 311 Mass. 341, 349 (1942).

Siebert, The Rights and Privileges of the Press (1934), pp. 19, 20.

45 American Jurisprudence, p. 420.

c. The law of Rhode Island is that these records are public records to which persons in the position of these respondents clearly have the right of access.

In addition to the state of the record itself and in addition to the general principles and authorities applicable to this subject, we have in the case at bar an express and unreversed holding of a lower Rhode Island Court (the Superior Court) that the records here involved are public

records to which persons in the position of these respondents have the right of access. *Nolan* v. *McCoy,* M.P. No. 2806, Superior Court, R.I. (1949). Both the District Court and the Court of Appeals found that the law of Rhode Island was to this effect.

The matter had come up in the State Courts in this way: Some of the problems in the case at bar (exclusive of questions under the United States statutes) were the subject of litigation in the State Courts between virtually the same parties. This is the mandamus action referred to in the two opinions below. On 18 May, 1949, the Superior Court for the County of Providence, in the State of Rhode Island, held that these particular tax abatement records were public records. See *Nolan* v. *McCoy,* M.P. No. 2806, *supra.* The relevant part of the Superior Court's decision is set out in the District Court's opinion (Record, pp. 62-63). The Superior Court, after dealing with the general principles and authorities involved, held that "it is our opinion that the records in question are public records" (Record, p. 62).

The petitioners would have this Court believe that this decision was reversed by the Supreme Court of Rhode Island. It was not reversed. As the Court of Appeals has stated, the Supreme Court merely reversed "for procedural reasons on a motion to quash" (Record, p. 656). The paragraph of the opinion of the Supreme Court of Rhode Island which left the matter fully open is quoted in the opinion of the Court of Appeals (Record, pp. 656-657).

The petitioners contend that an earlier opinion—*In re Caswell,* 18 R.I. 835 (1893)—is applicable here. Both of the Courts below dealt with the *Caswell* case. The Court of Appeals said (Record, p. 657):

> "Judicial records, such as the court was considering in *In re Caswell's Request* referred to above, stand on a different basis from the fiscal records of a municipal

corporation. Traditionally, courts have exercised the power to impound their records when circumstances warranted such action, but we are not aware of any comparable power of municipal officials with respect to the fiscal records of their municipality. Indeed the existence of such a power would be quite at variance with democratic principles as developed in this country. Thus we take the restrictive language used in *In re Caswell's Request* as intended to have application to judicial records, but not by any means as necessarily intended also to apply to the fiscal records of a municipality. This appears to be the construction put upon that language by the State Superior Court in the mandamus proceeding, and we see nothing in the opinion of the Supreme Court of Rhode Island in that proceeding to refute that construction."

(It might be noted parenthetically that the decision in *In re Caswell*—contained in an Appendix to volume 18 of the Rhode Island Reports—consists of advice to a Court clerk as to whether he should make available to a newspaper some "painful and sometimes disgusting" divorce depositions involving a party in a divorce proceeding who was a member of the bar. The Court advised the Clerk not to make the record available.)

Thus, as stated in the opinion of the Court of Appeals in the case at bar, the Superior Court decision in *Nolan* v. *McCoy* stands unreversed as the law of Rhode Island and therefore should be and in fact must be followed by the United States Courts.

Fidelity Union Trust Co. v. *Field,* 311 U.S. 169, 177-178 (1940).

West v. *American Tel. & Tel. Co.,* 311 U.S. 223, 236, 237 (1940).

We submit, therefore, that the contention of the petitioners that these records are not public records to which respondents have the right of access and were improperly held to be such public records by the two Courts below is utterly without merit. Moreover, in view of the painstaking analysis of the problem by the two lower Courts, it would appear that no question of such doubt or importance is involved as to warrant the granting by this Court of a writ of certiorari.

II. The Petitioners' Contention that the Providence Journal and its Representatives were Not Deprived of the Equal Protection of the Laws on Any "Matter of Right" is Without Merit, either as a Proposition of Law or as the Basis for an Application for Certiorari.

As stated under the heading "Questions Presented, etc." this second contention is really governed by the determination of the first question. Inasmuch as it is clear that these records were public records and that the Providence Journal and its representatives were arbitrarily refused access to them (while at the same time access to them was granted to a locally competing newspaper), then it follows that these respondents were denied the Constitutional safeguard of the "equal protection of the laws" and that their rights were infringed.

We respectfully refer this Court to the two opinions below. Important and conclusively persuasive portions of the opinion of the Court of Appeals on this point are as follows (Record, pp. 655, 658):

> "Thus under the Constitution of the United States all persons within the jurisdiction of a State are entitled as of right to the equal protection of its laws,

(*Truax* v. *Raich*, 239 U.S. 33 (1915)) and Congress has implemented that right, first by providing a cause of action for its enforcement, and second by giving the district courts original jurisdiction of that cause of action.

"The question then is whether the plaintiffs are persons within the jurisdiction of the State who have been denied by the State the equal protection of its laws. Obviously the individual plaintiffs, and also the corporate plaintiff, are 'persons' within the jurisdiction of the State of Rhode Island. *Grosjean* v. *American Press Co., Inc.*, 297 U.S. 233, 244 (1936), and cases cited. And it is well settled that municipal ordinances and the actions in office of municipal officials constitute state action and are within the prohibition of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Lovell* v. *Griffin*, 303 U.S. 444, 450 (1938). . . .

"Hence for present purposes it is established that the records with which we are concerned are 'public records', and as such the individual plaintiffs, if not as members of the general public at least as citizens of Rhode Island, and the corporate plaintiff as a local tax payer, are entitled under state law to inspect those records.* And clearly the refusal of the defendants to accord the plaintiffs their right of inspection while granting such right to a competitor, the Pawtucket Times, constitutes a denial of equal protection of the laws which gives rise to a case or controversy within federal jurisdiction under the statutes quoted earlier in this opinion."

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*"It is not disputed that if the plaintiffs have the right of inspection they also have the right of publication."

III. The Form of the Complaint Presents No Issue for This Court.

The District Court denied the motion with regard to this (Record, p. 64). The Court of Appeals took similar action (Record, pp. 658-659).

See Federal Rules of Civil Procedure, Rule 61.

Conclusion.

The present petition thus discloses no reason for disturbing the judgment of the Court of Appeals affirming the judgment of the District Court and no such special or important reason as to justify the granting of certiorari. We ask, therefore, that the petition be denied.

Respectfully submitted,

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